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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

No. 577.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Petitioners,

v.

E. B. SPILLER et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PETITIONERS.

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v.

E. B. SPILLER et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PETITIONERS.

On November 1, 1926, this Court granted a petition for a writ of certiorari directed to the United States Circuit Court of Appeals for the Eighth Circuit, to review the decree of that Court entered June 24, 1926, in the case of E. B. Spiller, et al., appellants, v. St. Louis and San Francisco Railroad Company, et al., appellees, and the cause is now before this Court for determination.

Petitioner St. Louis and San Francisco Railroad Company is hereinafter referred to as "Railroad Company",

and petitioner St. Louis-San Francisco Railway Company is hereinafter referred to as "Railway Company". The decree of the Circuit Court of Appeals reversed an order and decree entered by the District Court of the United States for the Eastern District of Missouri dismissing intervening petitions filed by respondents (hereinafter referred to as interveners) in a certain receivership proceeding in said District Court pending, entitled "North American Company, Complainant, v. St. Louis and San Francisco Railroad Company, Defendant, No. 4174, Consolidated Cause Final", whereby interveners sought to establish as preferential claims against the property of the Railroad Company, purchased on behalf of the Railway Company at foreclosure sale, certain judgments, with interest thereon, obtained by interveners against the Railroad Company in the District Court of the United States for the Western District of Missouri, based on orders of reparation made by the Interstate Commerce Commission in respect of freight charges collected by the Railroad Company from interveners for the transportation of certain interstate shipments of cattle. The decree of the Circuit Court of Appeals further remanded the proceeding to the District Court with instructions to enter judgment in favor of interveners for the amounts therein set forth, the same to be adjudged as prior in lien and superior in equity to the mortgages of the Railroad Company and directed to be enforced against the

property conveyed to the Railway Company as assignee of the purchasers at said foreclosure sale.

The validity of the reorganization of the Railroad Company is not involved in this proceeding.

I.

OFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW.

Opinion filed in District Court August 23, 1922, on Exceptions to Report of Special Master; North American Company v. St. Louis and San Francisco Railroad Company; Spiller v. same; Spiller, et al., v. same, 288 Fed. 612, (R. 216).

Opinion of Circuit Court of Appeals filed June 24, 1926, Spiller, et al., v. St. Louis and San Francisco Railroad Company, et al., 14 Fed. (2d) 284, (R. 743).

II.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

1. **The date of the decree of the Circuit Court of Appeals for the Eighth Circuit to be reviewed.**

The opinion of the Circuit Court of Appeals and its decree reversing the decree of the District Court for the Eastern District of Missouri were filed and entered June 24, 1926 (R. pp. 743, 769).

2. The specific claims advanced, and rulings made, in the Circuit Court of Appeals, which are relied upon as the basis of this Court's jurisdiction.

In the Circuit Court of Appeals appellees (petitioners here) advanced the following specific claims, upon which the Court of Appeals made the following rulings:

First: That the Railroad Company in collecting freight charges at the rates then legally in effect did not become a trustee ex maleficio.

The Court of Appeals ruled that the rates, which the Interstate Commerce Commission afterwards found to be unjust and unreasonable, were therefore unlawful, and that the Railroad Company in collecting such rates became a trustee ex maleficio (R. 762).

Second: That the trust fund doctrine could not be invoked by interveners.

The Court of Appeals ruled that interveners could invoke the trust fund doctrine even though the moneys collected could not be traced into any distinct fund or into any specific property (R. 763, 764).

Third: That the trust fund theory was inconsistent with, and abrogated by, the Act to Regulate Commerce, and by the exclusive remedies for collection by reparation prescribed by that Act.

The Court of Appeals ruled that an equitable action based on the trust fund doctrine was not inconsistent with the remedy by reparation prescribed by the Act to Regulate Commerce (R. 765).

Fourth: That interveners' claims were not preferred debts of the Railroad Company, and, if allowable at all, could only be established as general unsecured creditors' claims.

The Court of Appeals ruled that interveners were entitled to have their claims established as preferential claims superior to the rights of other creditors, including the bondholders, in the amounts of the judgments obtained by them against the Railroad Company, with interest from August 1, 1916, a date more than three years after the date of the appointment of receivers of the property of the Railroad Company on May 27, 1913 (R. 768).

Fifth: That interveners were guilty of inexcusable laches in failing to file their claims or demands in the receivership suit against the Railroad Company as required by the interlocutory decree rendered therein, and in delaying to file application for leave to file such claims until more than four years after the sale was confirmed, and that their claims were properly dismissed by the District Court.

The Court of Appeals ruled that interveners were not guilty of laches in failing to file their claims, or in such delay, and that it was error to dismiss their intervening petitions on that ground (R. 768).

Sixth: That interveners were precluded by the final decree rendered in the receivership suit against the Railroad Company and the order of confirmation of sale

thereunder from asserting any claim against the Railway Company or its property.

The Court of Appeals ruled that interveners' claims arose after the entry of the final decree and that interveners were not precluded by the final decree and order of confirmation of sale from asserting said claims (R. 768).

3. The statutory provision under which this Court's jurisdiction is invoked.

Section 240 (a) of the Judicial Code, as amended February 13, 1925 (Chapter 229, Sec. 1, 43 Stat. 938; Sec. 1217, U. S. Comp. Stat. Cum. Supp. 1925).

4. Cases believed to sustain the jurisdiction of this Court.

Among the cases believed to sustain the jurisdiction of this Court are the following:

Spiller v. Atchison, Topeka and Santa Fe Railway Co., 253 U. S. 117,
Pennsylvania Railroad Co. v. International Coal Mining Co., 230 U. S. 184,
Schuyler v. Littlefield, 232 U. S. 707,
Keogh v. Chicago & Northwestern Railway Co., et al., 260 U. S. 156.

III.

STATEMENT OF THE CASE.

In 1903 the Railroad Company advanced its freight rates on cattle shipments from the Southwest to Kansas City, Chicago and other markets, about three cents per hundredweight, filed and published the schedules of the advanced rates, and otherwise complied with the requirements of the Act to Regulate Commerce. These rates were challenged by divers parties as unreasonable and unjust, the specific challenge being by the Cattle Raisers' Association of Texas. The Interstate Commerce Commission (hereinafter called Commission) on August 16, 1905, found the rates were unjust and unreasonable to the extent of the advance of three cents per hundredweight made in 1903. (11 I. C. C. Rep. 296). The Commission made no order on this report and finding and reserved all questions of reparation. (R. 265).

After the passage of the Hepburn Act of June 29, 1906, the Commission, on petition of interveners, reopened the case. After again trying the case in full, the Commission on April 14, 1908, again pronounced the rates excessive and unreasonable (13 I. C. C. Rep. 418), and made an order prescribing rates for the future to take effect November 17, 1908, being the rates existing prior to the advance made in 1903. Questions of reparation to be allowed only from August 29, 1906, were reserved by the Commission

to be subsequently dealt with as specific claims were presented. (R. 274, 293).

Between August 29, 1906, and November 17, 1908, the Railroad Company collected from certain shippers of cattle, whose claims are held by interveners, regularly and legally established freight rates, which the Commission on April 14, 1908, found to be unreasonable and unjust to the extent of about three cents per hundredweight. Interveners presented to the Commission claims for reparation based on said excessive rates collected from August 29, 1906, to November 17, 1908, and on January 12, 1914, the Commission ordered the Railroad Company to pay to interveners sums aggregating upward of $30,000, including interest to July 15, 1914, as reparation for damages sustained by interveners as the result of the excessive charges so collected. (R. 298, 300, 302).

On December 29, 1914, interveners filed suits against the Railroad Company in the District Court of the United States for the Western District of Missouri, at Kansas City, on the orders of reparation made by the Commission. (R. 304, 314). On August 16, 1916, interveners recovered judgments in said suits, with interest thereon from August 1, 1916, (R. 315), and such judgments were subsequently on appeal affirmed by this Court on May 17, 1920, (253 U. S. 117), the mandate of this Court being filed in the District Court on June 6, 1920. (R. 319).

On May 27, 1913, on the bill of complaint of North American Company (a general creditor), filed in the Dis-

trict Court of the United States for the Eastern District of Missouri, that Court appointed receivers for all of the properties of the Railroad Company for the benefit of its creditors as their interests might appear. (R. 11). The receivers took possession of and proceeded to operate all the property of the Railroad Company. On April 3, 1914, a like bill was filed by another creditor, and that suit was consolidated with the suit of North American Company. On May 29, 1914, in this consolidated cause, the District Court rendered an interlocutory decree (R. 639) to the effect that all of the property of the Railroad Company was thereby impounded, sequestered and set apart to pay the debts and obligations of the Railroad Company; that all parties who claimed any interest in or lien upon any of the property of the Railroad Company in the hands or under the control of the receivers should file verified statements of their claims with the Special Master on or before October 1, 1914, and that each of them who failed or refused so to do should, by such failure, be barred from receiving any share in the distribution of any of said funds of the property or of the proceeds thereof. Notice of this order and of the limitation of the time for the presentation of claims, in order to permit the holders thereof to derive any benefit from or share in the distribution of the property in the hands of the receivers or of its proceeds, was ordered to be and was duly given by proper publication of the order itself. (R. 641). By subsequent orders the Court extended the time for the presentation

of such claims, and that time finally expired on February 1, 1916. (R. 642).

On May 22, 1914, the trustees under the general lien mortgage of the Railroad Company, dated August 27, 1907, filed bill for foreclosure. On July 9, 1914, the trustees of the Railroad Company's refunding mortgage, dated June 20, 1901, filed bill for foreclosure. The same receivers theretofore appointed were appointed in these proceedings, who immediately took possession of and impounded all the mortgaged property for the benefit of the mortgage bondholders, and by proper orders all these suits were consolidated into a single suit entitled "North American Company, Complainant, v. St. Louis and San Francisco Railroad Company, Defendant, No. 4174, Consolidated Cause Final," and the final decree of foreclosure and sale was rendered in this consolidated cause and in each of its constituent causes. Substantially all of the property of the Railroad Company was subject to the mortgages which were thereby foreclosed.

On March 31, 1916, the final decree of foreclosure and sale of all the property of the Railroad Company was rendered. (R. 590). On July 16, 1916, all this property was sold under that decree to purchasers for the Railway Company, which received and took charge of the property on or about November 1, 1916, assuming the obligations of the purchasers, and has since, except for the period of Federal control, been in possession of and operating the same. On August 29, 1916, the court confirmed the sale

after a hearing upon notice to all parties in interest. (R. 676).

The final decree (R. 590) by Article Eighteenth (R. 633, 634) made provision for a fair and timely offer of cash or participation in the new company through stocks, bonds or otherwise to all creditors of the Railroad Company who had presented their claims in accordance with the interlocutory decree, and the court reserved jurisdiction to determine whether such an offer had been made, with the right to modify the decree in case it determined that no such offer had been made. In St. Louis-San Francisco Railway Company v. McElvain, 253 Fed. 123, the court found that such offer had been made to all who had entitled themselves thereto by filing their claims as required. The order confirming the sale also finds that such offer had been made (R. 676, 679). No appeal was perfected from any of these orders or decrees in the receivership case.

Interveners did not file any verified claim to any interest in or lien upon the property or the proceeds of the property of the Railroad Company in the hands of the receivers, as required by the terms of the interlocutory decree, under the provisions of which the time for filing such claims finally expired February 1, 1916. At the hearing on the application for confirmation of the sale on August 29, 1916, interveners gave notice to the parties to the consolidated cause that they had claims against the Railroad Company for illegal freight exactions that had been re-

duced to judgment in the District Court of the United States for the Western District of Missouri on August 16, 1916, that an appeal was being taken from that judgment by the Railroad Company, and that interveners **would claim** that their claims evidenced by that judgment were prior in lien and superior in equity to the liens and claims of every other party whomsoever upon and to the property of the Railroad Company in the hands of the receivers. (R. 587). No other or further suggestion, presentation or action was made or taken by interveners to present or prove their claims on or to the property sold and delivered to the Railway Company as assignee of the purchasers under the foreclosure decree, or against the Railway Company, until December 2, 1920, when interveners applied to the District Court for leave to file their intervening petitions in the consolidated receivership suit.

The court granted the application for leave to file such intervening petitions on February 12, 1921, (R. 13, 61); such petitions were filed and referred to a Special Master, who, after hearing same and making extended findings of fact and conclusions of law, recommended that judgment be entered in favor of interveners for the amounts of the judgments awarded by the District Court of the United States for the Western District of Missouri, with interest thereon from August 1, 1916, and that the entire amount be adjudged as prior in lien and superior in equity to the refunding and general lien mortgages of the Railroad Company, and that it should be enforced against

the property conveyed to the Railway Company as assignee of the purchasers at the foreclosure sale. (R. 134). Exceptions to the report of the Master were filed by the Railroad Company and by the Railway Company. (R. 197, 216). The District Court overruled the conclusions of law of the Master, and ordered and adjudged that the exceptions to those parts of the report of the Master, which were contrary to and inconsistent with the views expressed by the Court in its memorandum opinion filed, should be and were sustained, and dismissed the intervening petitions of interveners. (R. 242).

It appears from the evidence before the Master (R. 329, 331), that the moneys collected by the Railroad Company from interveners between August 29, 1906, and November 17, 1908, were not kept by the Railroad Company in a separate or designated account or fund, nor were they separated from other gross receipts of the Railroad Company derived from the operation of its lines of railroad, but were deposited in banks with other moneys of the Railroad Company in its general account, and said banks had no instructions from the Railroad Company to keep said moneys in a specific fund, nor to refrain from paying the same out in the ordinary course of business on the Railroad Company's checks against its funds in said banks, nor did said banks keep said moneys in a separate account, and the Railroad Company, in payment of its ordinary current expenses, in improvements to its property, and otherwise, checked out of its deposits in each

of said banks during each year from June 1, 1906, to May 27, 1913, sums of money largely in excess of the moneys so collected from interveners, and deposited in said banks during each of said years sums of money largely in excess of the amounts so collected. There was no evidence that some or all of these accounts were not from time to time completely exhausted during that period.

From the order and decree of the District Court dismissing their intervening petitions interveners appealed to the Circuit Court of Appeals, which Court on June 24, 1926, by its order and decree reversed the order and decree of the District Court and remanded the cause to the District Court with instructions to enter judgment in favor of interveners for amounts equivalent to the judgments obtained by interveners in the District Court of the United States for the Western District of Missouri, with interest thereon from August 1, 1916, the same to be adjudged as prior in lien and superior in equity to the refunding and general lien mortgages of the Railroad Company, and directed to be enforced against the property conveyed to the Railway Company as assignee of the purchasers at the foreclosure sale had in the consolidated receivership case. (R. 768, 769).

The following chronological statement of proceedings affecting this controversy before the Interstate Commerce Commission, in the District Court of the United States for the Western District of Missouri, and in the receivership suit against the Railroad Company in the District

Court of the United States for the Eastern District of Missouri, may enable the Court more readily to understand the history of this litigation:

1903—The rates complained of were lawfully established.

1904—The rates were attacked before the Commission as unjust and unreasonable.

1905—The Commission found the rates unjust and unreasonable.

June, 1906—The Commission was given power to prescribe rates.

November, 1906—The Commission set the proceedings for further hearing.

April, 1908—The Commission reaffirmed its decision of 1905.

May, 1913—Receivers were appointed on a bill alleging the Railroad Company's insolvency.

January, 1914—The Commission ordered reparation, and claim was made on the Railroad Company for payment in accordance therewith.

May, 1914—Foreclosure proceedings were instituted in the receivership case against the Railroad Company.

May, 1914—An interlocutory decree was entered in the receivership case wherein, among other things, the Court ordered, adjudged and decreed that the holders of any claim, claims or demands or obligations of or against the Railroad Company, and all persons claiming any interest in or lien upon any of the funds or property in the

hands of the receivers as creditors of the Railroad Company or in any other way, should file their respective claims, demands and obligations with the Special Master by October 1, 1914, and failing so to do they should be barred as provided in the decree. The time for filing claims was subsequently extended from time to time, finally expiring February 1, 1916. Due notice by publication of the foregoing provision of the interlocutory decree was given as required by the decree.

December, 1914—Interveners filed suit against the Railroad Company for damages in the District Court at Kansas City based on the orders of reparation made by the Commission.

March, 1916—A final decree was entered in the receivership case, Article Ninth of which directed the payment of unpaid claims of creditors of the Railroad Company "which have been or shall be admitted by the parties in interest or adjudged by this Court to be" preferential. Article Tenth of the final decree adjudged that due notice having been given for the presentation in the receivership case of claims and demands against the Railroad Company of every character and description whatsoever, no such claim or demand which had not been presented in accordance with the terms of the interlocutory decree, except a deficiency judgment and claims or demands arising after the entry of the decree, should be enforceable against the receivers, the property sold, or any part there-

of, any purchaser of the same, or entitled to share in the distribution of the proceeds of the sale.

July 16, 1916—The property of the Railroad Company was sold under the final decree.

August, 1916—Judgment for the amounts of reparation ordered by the Commission was obtained by interveners in the District Court at Kansas City.

August 28, 1916—The Railroad Company appealed from said judgment to the Circuit Court of Appeals.

August 29, 1916—An order confirming the sale of the Railroad Company's property was entered, the sale being made final and absolute, subject to the terms and conditions of the final decree and to all the reservations to the purchasers and to their assigns and to the court in the final decree contained.

November 1, 1916—The Railway Company took possession as assignee of the purchasers at foreclosure sale of the property of the Railroad Company.

October, 1917—The Circuit Court of Appeals reversed the judgment obtained by interveners against the Railroad Company in the District Court for the Western District of Missouri, and interveners appealed therefrom to this Court.

January 29, 1918—The receivers were discharged.

June, 1920—This Court reversed the judgment of the Circuit Court of Appeals and affirmed the judgment of the District Court for the Western District of Missouri

in favor of interveners and against the Railroad Company.

December 2, 1920—Interveners filed their application for leave to file intervening petitions in the receivership suit against the Railroad Company in the District Court for the Eastern District of Missouri.

February 12, 1921—Leave to file such intervening petitions was granted.

August 23, 1922—The intervening petitions were dismissed by the District Court, and interveners appealed to the Circuit Court of Appeals.

June 24, 1926—The Circuit Court of Appeals reversed the order and decree of the District Court dismissing interveners' petitions, and remanded the cause to the District Court with instructions to enter judgment in favor of interveners for amounts euqivalent to the judgments obtained by them against the Railroad Company in the District Court for the Western District of Missouri, with interest thereon from August 1, 1916, the same to be adjudged as prior in lien and superior in equity to the refunding and general lien mortgages of the Railroad Company, and directed to be enforced against the property conveyed to the Railway Company as assignee of the purchasers at the foreclosure sale had in the consolidated receivership case.

November 1, 1926—This Court granted petition for writ of certiorari to review said decree of the Circuit Court of Appeals.

As above stated, the time for presentation of claims in the receivership suit against the Railroad Company finally expired on February 1, 1916. The final decree in that case expressly adjudged the claims of all who had neither intervened nor filed verified claims foreclosed and barred from participation in the benefits of the property or its proceeds as against all parties claiming under that decree. On July 16, 1916, in reliance upon the interlocutory and final decrees, all the property of the Railroad Company was purchased for the Railway Company at the foreclosure sale. Then and thereby the court contracted to convey that property to the purchaser for the purchase price bid therefor, free from the claims of interveners, as the court had decreed that it was, and the purchaser contracted to pay the purchase price bid therefor. The court and the purchaser performed this contract. On August 29, 1916, the court confirmed the sale. A few days later it caused the property to be conveyed to the purchaser. The purchaser paid the price it had bid for it, issued its stocks and bonds to the amount of millions of dollars, and immediately placed them upon the market, so that many of them must have gone into the hands of innocent purchasers long before interveners on December 2, 1920, applied for leave to file their intervening petitions.

Numerous holders of reparation claims against the Railroad Company pending undetermined before the Interstate Commerce Commission filed their claims with the Special Master pursuant to the terms of the interlocutory

decree, and they were allowed as general creditors' claims in such sum, if any, as the Interstate Commerce Commission should order reparation, and if reparation was denied the order provided that such claims should be disallowed and dismissed. Interveners made no effort to file their claims as required by the interlocutory decree, and although the claims arose prior to November, 1908, and although the amounts were definitely established before the Interstate Commerce Commission early in 1914, and although they were reduced to judgment in the District Court for the Western District of Missouri in August, 1916, yet not until December, 1920, long after the issuance of bonds by the Railway Company in 1916, and long after the contract made by the Court with the Railway Company, contained in the terms of the final decree and in the order confirming the sale, did interveners make any effort to file their claims herein.

IV.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

1. The Circuit Court of Appeals erred in holding that collection of regularly established tariff rates was unlawful because such rates were afterwards found to be unjust and unreasonable.

2. The Circuit Court of Appeals erred in holding that the Railroad Company became chargeable as trustee ex maleficio in respect of the excessive charges collected.

3. The Circuit Court of Appeals erred in holding that the trust fund doctrine could be successfully invoked by interveners.

4. The Circuit Court of Appeals erred in holding that an equitable action to charge the Railroad Company as trustee ex maleficio was not inconsistent with the remedy by reparation prescribed by the Act to Regulate Commerce.

5. The Circuit Court of Appeals erred in holding that interveners were entitled to have their claims allowed as preferential claims superior to the claims of other creditors, including the bondholders, in the amounts of the judgments obtained by them against the Railroad Company.

6. The Circuit Court of Appeals erred in holding that interveners were entitled to interest on the amount of their claims (judgments) from August 1, 1916.

7. The Circuit Court of Appeals erred in holding that interveners were not guilty of laches in failing to file their claims as required by the interlocutory decree, or in delaying to file application for leave to file such claims until more than four years after the sale was confirmed, and that it was error to dismiss the intervening petitions on that ground.

8. The Circuit Court of Appeals erred in holding that interveners' claims arose after the entry of the final decree and were not barred, and that interveners were not precluded by the final decree and order of confirmation of sale from asserting said claims.

ARGUMENT.

I.

The decision of the Circuit Court of Appeals that the collection of legally established rates becomes wrongful and unlawful, because such rates are subsequently found by the Commission to be unjust and unreasonable, is erroneous and is in conflict with applicable decisions of this Court.

The charges which form the basis of respondents' claims were collected by the Railroad Company between August 29, 1906, and November 17, 1908. On April 14, 1908, the Commission found the rates to be unjust and unreasonable, and made an order prescribing rates for the future, to take effect November 17, 1908. On January 12, 1914, the Commission made an order of reparation in respect of the excessive charges collected by the Railroad Company during the period mentioned.

The rates collected by the Railroad Company were the lawful tariff rates in effect at the time, and were the only rates the Railroad Company was lawfully authorized to charge and collect, and the Railroad Company was under an absolute obligation to collect the published rates, whether reasonable or unreasonable, discriminatory or nondiscriminatory.

In Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 437, this Court held:

> "The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the act, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the act and the punishments which it imposed were directed not only against carriers but against shippers, or any person who, directly or indirectly, by any machination or device, in any manner whatsoever, accomplished the result of producing the wrongful discriminations or preferences which the act forbade."

In Pennsylvania Railroad Co. v. International Coal Mining Co., 230 U. S. 184, 197, this Court said:

> "The statute required the carrier to abide absolutely by the tariff. It did not permit the Company to decide that it had charged too much and then make a corresponding rebate, nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper (February 4, 1887, 24 Stat. 379, c. 104, §2; March 2, 1889, 25 Stat. 855, c. 382, §6; Armour Co. v. United States, 209 U. S. 56, 83). The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a

statute, binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation.

"In view of this imperative obligation to charge, collect and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the Commission by any order have made it valid."

In Robinson v. Baltimore and Ohio Railroad Co., 222 U. S. 506, 508, it was said:

"The act (to Regulate Commerce), whilst prohibiting unreasonable charges, unjust discriminations and undue preferences by carriers subject to its provisions, also prescribed the manner in which that prohibition should be enforced; that is to say, the act laid upon every such carrier the duty of publishing and filing, in a prescribed mode, schedules of the rates to be charged for the transportation of property over its road, declared that the rates named in schedules so established should be conclusively deemed to be the legal rates until changed as provided in the act, forbade any deviation from them while they remained in effect."

No order was, or could have been, entered by the Commission in August, 1905, requiring the Railroad Company to cease and desist from collecting the rates held to be unreasonable for the future, as the Commission did not at that time have power to prescribe rates for the future. It was merely the conclusion of the Commission that the rates then in effect were unjust and unreasonable (11 I. C. C. Rep. 296, 352).

The language used by Sanborn, Circuit Judge, in his opinion filed in the District Court on dismissing the intervening petitions of respondents, is peculiarly apt (288 Fed. 612, 629-630):

> "The railroad company collected these legally established rates. It had the decision and direction of the highest judicial tribunal in the land for its justification, and this Court is of the opinion that its collection of these rates was not unlawful. The prohibition of section 1 and that of section 6 must be read and interpreted together, and the correct construction of them is that the specific prohibition of section 6 constitutes an exception from the general prohibition of section 1. A construction that each prohibition is of equal force and equally applicable in such a case as that in hand would impose upon the carrier a penalty of a violation of section 1 if it complied with section 6, and the penalty of a violation of section 6 if it complied with section 1, and an interpretation which leads to such an absurdity ought to be rejected."

The decision of the Circuit Court of Appeals is not only in conflict with the controlling decisions of this Court hereinabove cited, but is further in conflict with the prior decision of the same Court of Appeals in the case of Chicago, B. & Q. R. R. Co. v. Merriam & Millard Co., 297 Fed. 1, 3, wherein it was said:

> "The claim that the rate was unlawful cannot be sustained. The duly filed and published tariff rate, while it was in force, was the only lawful rate. * * * It is not claimed that the carrier had made any change of these tariff rates at the time of these shipments. The report and opinion of the Commission filed on October 20, 1921, did not purport to and could not annul or change the existing tariff rate. * * * * Section 15 of the Interstate Commerce Act required that any change of the rates made by the Commission should be made, not by a report, finding or opinion, but by an order to the carrier to cease and desist from collection of the rate, to take effect not less than thirty days after the date of the order."

In support of its decision in the Merriam & Millard case the Circuit Court of Appeals cited and relied upon the decision of the District Court (288 Fed. 612) in the case now under review; yet the same Court of Appeals, without reference to its prior decision in the Merriam & Millard case, overruled the decision of the District Court in the instant case on which the decision of the Merriam & Millard case was founded.

II.

The decision of the Circuit Court of Appeals that the Railroad Company became chargeable as trustee ex maleficio of the excessive charges collected by it, and that the trust-fund doctrine could be invoked by respondents, is erroneous and in conflict with the decisions of this Court, with other decisions of the same Circuit Court of Appeals, and with the decisions of other Circuit Courts of Appeals, on the same matter.

The Circuit Court of Appeals held, that the excessive charges were wrongfully and unlawfully collected by the Railroad Company, that the Railroad Company thereby became chargeable as a trustee ex maleficio, that the trust-fund theory could be invoked by respondents to make their claims preferential and to give them priority, notwithstanding the moneys collected from respondents could not be and were not traced into a specific fund or into specific property which came into the hands of the receivers, and that it was not necessary so to trace such moneys.

The Railroad Company in collecting the charges, subsequently found by the Commission to be excessive, did not become a trustee ex maleficio:

First. The tariff rates were collected by the Railroad Company from respondents and were the only lawful rates that could have been collected.

Second. There was no evidence, presumptive or otherwise, that the sums collected by the Railroad Company

were retained by it and passed into the hands of the receivers, nor was there any evidence identifying the proceeds of the alleged trust fund or tracing the same, either in their original form or in other funds or property, in the hands of the receivers or the purchaser at the foreclosure sale.

There can be no fraud, actual or constructive, in which a trust ex maleficio must have its origin, where the Railroad Company collected the only charges permissible under the law, and where it would have been penalized had it attempted to collect, or had collected, charges other than those designated in the tariffs.

There is no evidence in the record warranting the application of the trust-fund theory. By stipulation (R. 329, 330, 331) it was agreed that during each of the years from 1906 to 1913 the Railroad Company expended large sums of money for improvements, equipment, interest payments, **and current expenses incurred in the ordinary operation of its property**; that during each of said years the Railroad Company had in cash on hand an amount of money in excess of respondents' claims; that during the period of the receivership, the receivers paid under court orders large sums of money for improvements, betterments, equipment, interest, **and current expenses of operation.**

It is further agreed in the stipulation:

> **"That the alleged overcharges constituting interveners' demands were not kept by defendant (the Railroad Company) in a separate or designated ac-**

count or fund, nor were they separated from other gross receipts of defendant derived from the operation of its lines of railroad; that said moneys so collected by defendant were deposited in banks with other moneys of defendant in defendant's general account, and said banks had no instructions from defendant to keep said moneys in a specified fund or to refrain from paying same out in the ordinary course of business on defendant's checks against its funds in said banks, nor did said banks keep said moneys in a separate account, and that defendant checked out of its deposits in each of said banks during each year from June 1, 1906, to May 27, 1913, sums of money largely in excess of said alleged overcharges, and deposited in said banks during each of said years sums of money largely in excess of said alleged overcharges."

The receivers on their appointment took possession of approximately $334,000, the property of the Railroad Company. (R. 331, 332). In view of the admitted facts there can be no reasonable presumption indulged that any portion of the moneys collected by the Railroad Company prior to November, 1908, entered into this sum. The logical presumption is that all the moneys collected by the Railroad Company from interveners from 1906 to 1908 were paid out by the Railroad Company years before the receivership, and the presumption is just as weighty that they were paid in current expenses of operation as that they were paid for the benefit of the bondholders.

That these moneys were expended by the Railroad Company long prior to the receivership does not have to rest upon presumption, because in the notice addressed by respondents to Henry W. Taft, attorney for the reorganization Committee and the St. Louis & San Francisco Railway Company, dated August 29, 1916, when the application for the confirmation of the sale was under consideration by the court, it was expressly stated that the sums so collected by the Railroad Company were **"used by said Company in the same manner as other freight charges collected."** (R. 587, 588).

The first bi-monthly report of the receivers shows that they **collected** during the period May 27, 1913, to June 30, 1913, on business accrued prior to their appointment, $2,245,153.79, and **paid** on business accrued prior to their appointment, $3,985,121.02. (R. 565). They also paid prior to February 18, 1914, preferred claims against the Railroad Company aggregating $2,229,950.47. (R. 664). The first and only notice served by respondents of their intention to establish their claims as preferential was given in August, 1916. These facts do not justify any presumption that the receivers retained any of the moneys that they received from the Railroad Company in a separate fund, or as trustees, when they had no knowledge of the assertion of any preference by respondents.

Respondents' intervening petitions were filed in February, 1921. The Railway Company took possession as assignee of the purchasers of the property of the Railroad

Company November 1, 1916, and has continued, except for Federal control, to operate the property since that date. There is no evidence in the record concerning the amount of money in the treasury of the Railway Company during that period, and the trust-fund doctrine would fail for that reason, if for no other.

The Circuit Court of Appeals conceded (R. 763) that the moneys collected from respondents were commingled with other funds and could not be traced into any separate or distinct fund in the hands of the receivers; but held that, in order to establish a trust in a railroad company for the benefit of the shipper as to freight charges wrongfully exacted, it is not necessary to show that the identical money received has been placed in a separate account or to trace the identical fund. In so holding, the decision of the Circuit Court of Appeals is in conflict with the rule as established by the decisions of this Court and of other Circuit Courts of Appeals.

The proceeds of a trust fund or property wrongfully converted by a trustee can be followed by the cestui que trust and the trust impressed thereon as against the trustee **only** so long as they can be **identified** and traced either in their original form **or in other funds or property**, in the hands of the trustee, **and where this cannot be done** the cestui que trust is not entitled to follow such proceeds into the hand of the trustee or his representative and claim a lien thereon, but is entitled only to come in as one of the general creditors of the trustee.

In Litchfield v. Ballou, 114 U. S. 190, 195, this Court said:

> "If the complainants are after the money they let the city have, they must clearly identify the money, or the fund, or other property which represents that money, in such a manner that it can be reclaimed and delivered without taking other property with it, or injuring other persons or interfering with others' rights."

See also, Schuyler v. Littlefield, 232 U. S. 707.

The decision of the Circuit Court of Appeals is clearly in conflict with the above decisions of this Court. That decision is further in conflict with the previous decisions of the same Circuit Court of Appeals in the following cases:

Empire State Surety Co. v. Carroll County, 194 Fed. 593, wherein the fifth syllabus reads:

> "It is indispensable to the maintenance by a cestui que trust of a claim to preferential payment out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified piece of property which came to the hands of the receiver."

State Bank of Winfield v. Alva Security Bank, 232 Fed. 847, 849, wherein it was said:

> "The capital defect, however, of plaintiffs' theory is their treatment of the grand division of the bank's

assets in its reports known as 'Cash and Sight Exchange' as a 'fund' within the law relating to the following of trust funds. To adopt that theory is to reestablish under a mere bookkeeping disguise the exploded notion that a trust fund may be recovered if it can be traced into the general assets of an insolvent estate. The courts have shown a tendency to restrict the 'trust fund' doctrine (Empire State Surety Co. v. Carroll County, 195 Fed. 593, 114 C. C. A. 435; Board of Commissioners v. Strawn, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A. (n. s.) 1100; In re Brown, 193 Fed. 24; Commercial National Bank v. Armstrong (C. C.), 39 Fed. 684). The rule is accurately stated and numerous authorities cited by this Court in the first case referred to, * * *."

Also, Central State Bank v. McFarlin, 257 Fed. 535, and Scullin Steel Co. v. North American Co., 255 Fed. 945.

The decision of the Circuit Court of Appeals in the instant case is further in conflict with the subsequent decision of the same Court in the case of Farmers' National Bank, et al., v. Pribble, 15 Fed. (2d) 175, wherein, after again affirming the doctrine as announced in its prior decisions in the Carroll County, Bank of Winfield, McFarlin and Steel Company cases, supra, and other decisions of the same Court, notably Mechanics & Metals National Bank v. Buchanan, 12 Fed. (2d) 891, the Court said, at page 176:

"The doctrine that a cestui que trust, whose property had helped to swell the general assets of a cor-

> poration which was or became insolvent, has a prior right to or interest in those general assets, without specific identification and tracing of such claimant's property, was again expressly repudiated by this court in the case last cited."

It may be noted in passing that the author of the opinion of the Circuit Court of Appeals, and one of the concurring Judges therein, in the instant case concurred in the opinion and holding of the same Court in the Pribble case.

Said decision is further in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of Weideman v. Newton Arms Co., 271 Fed. 302, 304, wherein it was said:

> "But even if the trust relation be established, if the trustee is in bankruptcy or insolvency, it is absolutely necessary to trace the money covered by the trust into some particular property or fund. It is just as necessary to trace as it is to prove the trust relation. There is no pretense of tracing this money into the receiver's hands in any other sense than that the money was spent in carrying on a business or procuring certain articles of machinery and the like, which ultimately passed into the receiver's hands. This is not enough; cash is never traced merely by showing that it went into a general estate. This subject we have recently treated in Re Bolongnesi, 254 Fed. 770, 166 C. C. A. 216; Re Matthews, 238 Fed. 785, 151 C. C. A. 635, and Re Jarmulowsky, 261 Fed. 779."

Said decision is further in conflict with the decisions of the Circuit Court of Appeals for the Ninth Circuit in the cases of Titlow v. McCormick, 236 Fed. 209, and United States National Bank of Centralia v. City of Centralia, 240 Fed. 93.

The application of the doctrine stated in the foregoing cases shows the futility of an effort to establish a trust fund in respect of respondents' claims.

In the Carroll County case, supra, at page 605, it is held:

> "Where a trustee has mingled in a common fund the moneys of many separate cestuis que trustent and then made payments out of this common fund, **the legal presumption is that the moneys were paid out in the order in which they were paid in**, and the cestuis que trustent are equitably entitled to any allowable preference in the **inverse order** of the times of their respective payments into the fund."

At page 608 is the following:

> "It is indispensable to a preferential payment that these amounts should be traced by adequate proof into some specific fund or property which came to the receiver's possession."

The moneys collected by the Railroad Company as overcharges between 1906 and 1908 were deposited in different banks and commingled with other moneys of the Railroad Company in those banks. The banks

had no instructions to keep the overcharge money in a specific fund, nor to refrain from paying it out in the ordinary course of business on the Railroad Company's checks, nor did the banks keep the overcharge money in separate accounts, and the Railroad Company checked out of its deposits in each of the banks sums of money largely in excess of the overcharges. The record facts, therefore, bring this case directly within the Litchfield, Carroll County and Weideman cases, supra.

There was no fraud, either actual or constructive, committed by the Railroad Company in this case. There was no fiduciary relation between the Railroad Company and the shippers, and no relation of principal and agent in any form. The Railroad Company collected the money in good faith as its own. The only relationship existing between the Railroad Company and the shippers was one of debtor and creditor. The Railroad Company claimed and demanded of the respective shippers as a matter of right certain sums for transporting their cattle. When the shippers paid out the charges they lost title to, or the right to demand the return of, the identical money paid to the Railroad Company. The title to the freight charges passed to the Railroad Company at the time of collection, leaving to the shippers claims for damages to be presented and prosecuted under the provisions of the Interstate Commerce Act. In collecting the tariff rates which were in effect at the time, the Railroad Company collected the only rates which it could lawfully have collected. The

trust arose, if at all, at the time of the alleged illegal act. Every constructive trust must arise at the occurrence of the fact which creates it. 39 Cyc. 176; Grone v. Case, 192 Pa. State, l. c. 331; McDonald v. Andrews, 40 Pa. State Sup., l. c. 151; Wheeler v. Reynolds, 66 N. Y. 233.

The character and nature of the act, whether legal or illegal, is fixed when it occurs. There is no possible ground for the application of the trust-fund theory in this case.

III.

The trust-fund theory is inconsistent with, and is abrogated by, the exclusive remedy for collection of overcharges prescribed by the Act to Regulate Commerce; and the decision of the Circuit Court of Appeals that the equitable remedy is not inconsistent with the remedy by reparation is erroneous.

The theory of the intervening petitions filed by respondents in the receivership case against the Railroad Company is that the Railroad Company became indebted to respondents for certain amounts **in damages**, and that the judgments therefor obtained in the District Court at Kansas City are entitled to preference over the lien of the Railroad Company's mortgages. The indebtedness throughout the petitions is referred to as "damages." The inconsistency between the remedy by reparation first pursued by respondents and the equitable remedy now sought

to be pursued by them is apparent from the theory of the intervening petitions themselves.

In its opinion in this case, the Circuit Court of Appeals says:

> "We see no reason why an action at law for money had and received bars an equitable right to enforce a trust ex maleficio after said judgment is secured, in aid thereof." (R. 765).

To this view the language used by Sanborn, Circuit Judge, sitting in the District Court, in the opinion on exceptions to the report of the Special Master in favor of interveners (respondents), is a complete answer (288 Fed., l. c. 630):

> "Moreover, this alleged cause of action to charge the railroad company as a trustee ex maleficio of the moneys collected by it from the excessive charges is not maintainable (1) Because it is not consistent with and is abrogated by the Act to Regulate Commerce and by the exclusive remedies for such collections by reparation prescribed by that act; and (2) because the interveners are estopped from maintaining it by their prosecution of their inconsistent remedy by reparation under the act of Congress from 1906 to December, 1920 (Act to Regulate Commerce, §§ 8, 10 [U. S. Compiled Statutes §§ 8572, 8574]). The theory and indispensable basis of the alleged trust is that the ownership of the moneys collected by the company from the excessive charges never passed from the interveners to the collector, but that the lat-

ter took and its successor in interest still holds those moneys in trust for the owners, the interveners. The theory and the indispensable basis for the remedy by reparation provided by the Act to Regulate Commerce is that the interveners lost the title and ownership of the moneys collected by the company, were damaged by that loss, and that those damages are to be paid by the reparation provided by Act to Regulate Commerce, §§ 8, 10 (U. S. Compiled Statutes, §§ 8572, 8577)."

In Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U. S. 426, this Court, in effect, held that the remedy by reparation prescribed by the Act to Regulate Commerce for the collection of excessive charges, where, as in this case, a decision of the Interstate Commerce Commission was essential to determine the unreasonableness and the extent of the unreasonableness of the rates, was exclusive, and that no action at common law could be maintained on account thereof. A like view was expressed in the case of Texas & Pacific Railway Co. v. Cisco Oil Mill, 204 U. S. 449.

In Keogh v. Chicago & Northwestern Railway Co. et al., 260 U. S. 156, this Court held that a shipper could not recover damages from a carrier under Section 7 of the Anti-Trust Act for the exaction of rates illegal because unreasonable, but that he was relegated to his remedy in damages under the Act to Regulate Commerce.

The claims of respondents evidenced by the judgments obtained by them against the Railroad Company in the

District Court at Kansas City were based upon orders of reparation made by the Commission, a debt the amount of which had been determined and fixed by the Commission. Respondents pursued the remedy prescribed by the Act to Regulate Commerce to collect that debt. That remedy is wholly inconsistent and at variance with the remedy they now seek to pursue by a proceeding in equity to charge the collector of the excessive charges and its successor in interest as a trustee ex maleficio thereof.

In Litchfield v. Ballou, 114 U. S. 190, 194, this Court said of the trust fund theory:

> "That theory discards the idea of a debt, and pursues the money into the property, and seeks the property, not as the property of the city to be sold to pay a debt, but as the property of the complainant, into which his money, not the city's, has been invested, for the reason that there was no debt created by the transaction."

In considering the trust fund theory, the Circuit Court of Appeals for the Fifth Circuit, in Butler v. Western German Bank, 159 Fed. 116, 117, said:

> "The claim is for the funds or property converted or wrongfully withheld. It is not founded on the idea that the defendant owes to the complainant a debt; on the contrary, it is based on the fact that the conduct of the defendant has been such that the relation of debtor and creditor has not been created."

The judgments covered by respondents' interventions are based upon awards of reparation made by the Commission. The common law right, if any, existing for recovery of damages sustained as the result of charging unreasonable freight rates, was abrogated by the passage of the Act to Regulate Commerce. Abilene Cotton Oil Co. and Cisco Oil Mill cases, supra. Hence, the terms of that Act must be looked to to determine the nature or character of a suit upon an award of reparation.

Section 16 of the Act to Regulate Commerce provides that if, after a hearing on a complaint made as provided in Section 13 of the Act, the Commission determines that any party complainant is entitled to **an award of damages** under the provisions of the Act for violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named; that if the carrier does not comply with an order for the payment of money within the time limit in such order, the complainant may file in the District Court of the United States, or in any State Court having jurisdiction, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises, **and that such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated.** Said Section also provides that all complaints **for the recovery of damages** shall be filed

with the Commission within two years from the time the cause of action accrues.

Respondents' judgments obtained in the District Court at Kansas City represent ordinary money demands against the Railroad Company for acts which, though lawful when committed, assume the nature of a tort because of a subsequent decision of the Commission holding the tariff rates to be unreasonable. The rates were collected from five to seven years prior to the appointment of the receivers. The status of respondents, if their claims could be considered, would be that of general unsecured creditors, with no right to priority over the bondholders either as to the income or the corpus of the estate, upon the trust-fund theory, or upon any other theory.

In Naylor & Co. v. Lehigh Valley R. Co. et al., 188 Fed. 860, it was held that a suit to enforce an order of reparation awarded by the Commission **is one sounding in tort for damages.**

In Southern Pacific Co. v. Goldfield Con. M. & T. Co., 220 Fed. 14, the Circuit Court of Appeals for the Ninth Circuit, in speaking of the nature of a suit filed to enforce an award of reparation by the Commission, said, at page 594:

> "It is entirely true that the reparation awarded the defendant in error by the Interstate Commerce Commission was not a penalty, but could only be recovered by it as damages growing out of the excess

of charge by the carrier companies, and that in the event of the refusal of the latter to pay such **damages an action at law was essential for the recovery thereof, which action, according to the express provision of section 5 of the amendatory act of June 29, 1906 (34 Stat. 590, c. 3591), is required to 'proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated'.''**

An analysis of the various provisions of the Act to Regulate Commerce shows that what is authorized is merely an action at law for damages sustained as the result of the violation of its terms.

In Spiller v. Atchison etc. R. Co., 253 U. S. 117, this Court, in holding that a claim for reparation is assignable, and in construing several sections of the Act, said, at pages 134 and 135:

> "Section 8 (24 Stat. 382) makes the common carrier, for anything done contrary to the prohibition of the act, 'liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act.' Section 9 entitles any person claiming to be damaged either to make complaint to the Commission or to 'bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable.' * * * Section 16 as amended (34 Stat. 590) provides that where an award of damages is made by the Commission and

> the carrier does not comply with the order, 'the complainant, or any person for whose benefit such order was made' may bring suit. * * * A claim for damages sustained through the exaction of unreasonable charges for the carriage of freight, is a claim not for a penalty but for compensation."

The decision of the Circuit Court of Appeals, that the equitable remedy to impress a trust in respect of overcharges is not inconsistent with the exclusive remedy by reparation prescribed by the Act to Regulate Commerce, is against the doctrine as announced by the above cited decisions of this Court.

IV.

Overcharges collected by the Railroad Company from five to seven years prior to the appointment of the receivers are not preferred debts of the Railroad Company.

The proposition that overcharges collected by the Railroad Company from five to seven years prior to the appointment of receivers of its property are not preferred debts of the Railroad Company is so completely covered in the opinion of Sanborn, Circuit Judge, in this case (288 Fed., l. c. 631, 632), and by the cases cited by him in support thereof, that it is deemed unnecessary to analyze or quote from the cases.

The general rule is announced in Illinois Trust & Savings Bank v. Doud, 105 Fed. 123, as follows:

> "The test of the preferential equity of a claim is its consideration. If its consideration was a current expense of the ordinary operation of the property of the mortgagor incurred in the usual course of its business, for labor, supplies and like things, necessary for the operation of the railroad, within a limited time, usually not exceeding six months anterior to the appointment of the receiver, the claim may be preferred in payment, otherwise it may not be."

The only case cited by the Circuit Court of Appeals in support of its decision in respect of the applicability of the trust-fund theory to the freight charges in question and in respect of respondents' right to preference in payment of their alleged claims is its own decision in the case of Love v. North American Co., 229 Fed. 103. The facts in the Love case were so radically different from the facts now under review as to destroy the Love case as authority for the decision of the Circuit Court of Appeals in the instant case.

The one fact alone that in the Love case state-made rates were superseded under the requirements that a bond be given for the return of the excess over the state rates if such excess was held illegal,and that the Railroad Company keep in a separate account a list of all excess charges collected by it, is of itself sufficient to distinguish the Love case from this case.

The opinion in the Love case is directly opposite to the opinion of the same Circuit Court of Appeals in Chicago & Alton R. R. Co. v. Trust Co., 225 Fed. 940, which involved a claim composed in part of overcharges. At page 944 the Court used this language:

> "They cite no act of Congress, however, and no decision of any court, that a mortgagor railway company which, as a common carrier, or a common carrier which, as a connecting carrier therewith, or both together, may, by failing to pay their debts to each other, **or by overcharging shippers, or by any other wrongful act, deprive bondholders of the mortgagor company of their prior lien, or impose upon them penalties for the wrongdoing of the carriers.**"

In all of the cases where debts of a railroad company arising within the six months period have been allowed as preferential, such allowance has been based upon the fact that the debt incurred was in the interest and to the advantage of the bondholders. There is neither evidence nor presumption in this case that these charges collected prior to November, 1908, were expended in the interest of the bondholders. There is no evidence in this case that these charges were diverted from the payment of the current expenses for the ordinary operation of the railroad to the payment of interest on bonded indebtedness, or otherwise applied to benefit bondholders. The stipulation in this case, hereinabove referred to (R., p. 329), shows sums were expended by the Railroad Company and by the receivers both in the interest of bondholders **and for current expenses.**

There is neither evidence nor presumption that out of the sums so expended the overcharges collected from respondents were paid for the interest of bondholders rather than for current expenses. If $50,000 were collected from respondents and $100,000 were expended in payment of interest and current expenses, of which $50,000 went to interest and $50,000 went to current expenses, there is no presumption that respondents' $50,000 went to interest rather than to current expenses. In other words there is no evidence in this case of diversion of income received from respondents to the benefit of the bondholders, and, as shown by the cases above cited and quoted from, this is the very foundation upon which respondents' claims for preference rest.

V.

The decision of the Circuit Court of Appeals allowing interest on respondents' claims from a date subsequent to the date of appointment of the receivers is erroneous.

By its decision the Circuit Court of Appeals has ordered and decreed that respondents are entitled to have their claims, in the amounts of the judgments obtained by them against the Railroad Company, with interest thereon from August 1, 1916, established as preferential claims superior to the rights of other creditors of the Railway Company, including the bondholders. Respondents'

claims arose when the excessive freight charges were collected in 1908 and prior thereto. These claims were primarily established by the proceedings before the Commission resulting in the orders of reparation, and finally established by the judgments rendered in the District Court at Kansas City on August 16, 1916. The receivers were appointed May 27, 1913, yet the Circuit Court of Appeals now decrees that respondents are entitled to interest on their claims from August 1, 1916, a date more than three years after the date the receivers were appointed and took charge of the property of the Railroad Company. The decision of the Court of Appeals in this respect is in conflict with the decision of this Court in Thomas v. Car Co., 149 U. S. 95, 116, wherein it is said:

> "As a general rule, after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the fund."

The decision of the Circuit Court of Appeals is further in conflict on the question of allowance of interest with the decisions of the Circuit Court of Appeals for the Fifth Circuit in the cases of Butler v. Western German Bank, 159 Fed. 116, and Richardson v. Banking Company, 94 Fed. 442, and with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of Merchants Nat. Bank v. School District, 94 Fed. 705, 709.

Not only is the decision of the Circuit Court of Appeals erroneous in allowing interest on respondents' claims for a period subsequent to the appointment of receivers, but said decision is further erroneous in directing that such interest be allowed as a preferential claim. Interest on the excessive charges was not wrongfully collected from respondents under duress any more than were the attorneys' fees which the Circuit Court of Appeals by its decision disallowed.

VI.

The decision of the Circuit Court of Appeals that respondents were not guilty of laches in failing to file their claims as required by the interlocutory decree in the receivership case, or in delaying to file application for leave to file such claims until more than four years after the sale was confirmed, and that it was error to dismiss their intervening petitions on that ground, is erroneous.

Respondents are asserting their claims under the final decree in the receivership case. (Intervening petitions, R. 15 and 62). One who intervenes in an equity suit enters subject to, and is bound and estopped by, all previous orders, decrees and acts of the court therein to the

same extent as if he had been a party to such suit when such orders, decrees and acts were made.

Swift v. Gas Co., 244 Fed. 20.

Among the orders, decrees and acts of the court in the receivership case by which respondents were bound, at the time of filing their interventions, and the integrity of which they are estopped to deny, are the interlocutory decree (R. 639), the final decree (R. 590), the order confirming sale (R. 676), and the order discharging the receivers (R. 581). Respondents ignored every order, decree and act of the court, except the order permitting the filing of their interventions.

It was necessary that respondents establish their claims before the Interstate Commerce Commission before the same could be finally **allowed** in the receivership case, but it was not necessary that they establish their claims, and afterward obtain a judgment for damages against the Railroad Company in another court and prosecute such judgment to a finality through the appellate courts, before **presenting** their claims or demands in the receivership case. Their claims, although finally reduced to judgment in August, 1916, arose in November, 1908, and prior thereto, the liability of the Railroad Company therefor was declared long prior to 1914, and the definite amount of such liability was established by reparation orders of the Commission in January, 1914. Respondents were then the holders of "claims, demands or obliga-

tions" of or against the Railroad Company, and the final judgment rendered against the Railroad Company in the District Court at Kansas City did not make them any the less "claims, demands or obligations." These claims, demands or obligations were by the interlocutory decree required to be filed with the Special Master by February 1, 1916, otherwise they were barred. (R. 639, 644). Respondents could as easily have filed claims in the receivership case as provided in the interlocutory decree as file them in the District Court at Kansas City for the purpose of ripening them into judgments. The evidence shows (R. 668) the filing with the Special Master of numerous claims, similar to those of respondents, which were then pending undetermined before the Interstate Commerce Commission, and those claims were allowed by the Special Master in such sum, if any, as the Commission should order reparation, and each such claim was allowed as a general unsecured creditor's claim and shared only in the order of distribution. Of the great total of claims of all classes filed with the Special Master under the interlocutory decree but a negligible amount had been reduced to judgment. Instead of availing themselves of the opportunity to file their claims, respondents have heretofore sought, and now seek, to capitalize their laches into an advantage over those holders of similar claims who diligently filed their claims as required by the interlocutory decree.

Respondents contended in the trial court, and in the Circuit Court of Appeals, that they had no notice of the terms of the interlocutory decree. This contention does not excuse their laches. Like orders are made in all receivership cases where foreclosure proceedings ensue or are contemplated, and lack of actual knowledge, where notice by publication is given as was done in this case (R. 641), does not furnish any excuse to the holder of a claim for failure to file it. The final decree in Article Tenth (R. 625) adjudged that notice had been given for the presentation in the receivership cause of claims and demands against the Railroad Company of every character and description whatsoever, and that the time for presenting such claims had expired. These are valid and enforceable provisions in favor of the purchaser. St. Louis Southwestern Ry. Co. v. Holbrook, 73 Fed. 112; Farmers' Loan & Trust Co. v. Railroad, 118 Fed. 204; Western New York etc. Railroad v. Refining Co., 137 Fed. 343; Manhattan Trust Co. v. Traction Co., 188 Fed. 1006; Chicago, R. I. & P. Ry. Co. v. Commission Co., 284 Fed. 955.

The above cited cases recognize the power of the court to require claims against the insolvent to be filed within a fixed period or be barred. Western New York etc. Railroad v. Refining Co., supra, involved reparation ordered by the Interstate Commerce Commission.

Respondents have throughout this litigation insisted that their cause of action arose in 1908. Mr. S. H. Cowan

has continuously represented respondents from 1903 until the present time. Associated with Mr. Cowan in the litigation instituted in the District Courts at Fort Worth, Texas, Kansas City and St. Louis, was Mr. Deatherage, a lawyer living at Kansas City, who remained in the cases until his death in January, 1921. That respondents and their attorneys knew of the receivership proceedings is apparent from the testimony of Mr. Cowan, who stated that he knew that fact, that he had handled many receivership suits during his long practice and knew that orders are generally made from time to time by the courts in which such suits are pending, fixing the time for filing claims against insolvent corporations in receivership, and that such is the usual practice (R. 646). Questions relating to the receivership were involved in the suits instituted in the Federal Courts at Fort Worth, Kansas City and St. Louis. Aside, therefore, from the notice published as required by the court fixing the time for filing claims against the Railroad Company, respondents were chargeable with notice of the court's order.

Whatever puts a party on inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty, and would lead to a knowledge of the facts by the exercise of ordinary intelligence and understanding. The question of actual notice is one of fact, but it is a question of law whether constructive notice is imputable to a party from particular facts, especially where, as in this case, the facts are not controverted. If a notice be pub-

lished in obedience to a positive law or a legal order, such publication, although not seen by the party sought to be charged thereby, is constructive notice upon him as a matter of law.

An illustration of the foregoing principles is notice by publication in administration. The law requires the notice to be given, and a party holding a claim against an estate will not be heard to say, when a claim is presented after the expiration of the time fixed by the notice for presenting claims, that he had no knowledge of the notice, and this is true although the holder of the claim be a non-resident of the state where administration is had. A notice published pursuant to positive statute is of no greater dignity, so far as charging constructive notice is concerned, than a notice published pursuant to a decree of court. A party having a claim against an estate in administration in a probate court knows that he must look to the records of that court to ascertain the progress of the proceedings, as his rights may be affected thereby, and the party claiming the right to assert a demand against an estate administered in receivership proceedings is required to know that he must examine the orders therein made if he expects to be protected thereby. When the sale of the property of the Railroad Company under the final decree in the receivership case was confirmed, respondents were present in court (R. 587), and should have sought to have the final decree amended, or a provision incorporated in the order confirming the sale with

respect to their claims, and if this was denied they had the right to appeal. They did none of these things. It is just as important that a time limit for filing claims against an insolvent, whose estate is administered by receivership proceedings, be made, as that a time limit should obtain for filing claims against decedents, bankrupts and assignors.

The following quotations from Wood v. Carpenter, 101 U. S. 135, are peculiarly appropriate to the situation. At page 139 is the following:

> "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar."

At page 140 is the following:

> "It is hard to avoid the conviction that the plaintiff's conduct marks the difference between forethought in one condition of things and afterthought in another."

Further at page 141:

> "Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it. The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it. A party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it."

Again, at page 143:

> "There must be reasonable diligence, and the means of knowledge are the same thing in effect as knowledge itself."

In The Lulu, 77 U. S. 192, l. c. 201 and 202, is the following language:

> "Express knowledge of the fact that the Master had sufficient funds for the purpose is not necessary to maintain the charge of bad faith, as it is well-settled law that a party to a transaction, where his rights are liable to be injuriously affected by notice, cannot willfully shut his eyes to the means of knowledge which he knows are at hand, and thereby

escape the consequences which would flow from the notice if it had actually been received; or, in other words, the general rule is that knowledge of such facts and circumstances as are sufficient to put a party upon inquiry, and to show that if he had exercised due diligence he would have ascertained the truth of the case, is equivalent to actual notice of the matter in respect to which the inquiry ought to have been made."

Respondents are brought squarely within the doctrine of the above cited cases. They are bound by the orders in the receivership case, are conclusively held to have had notice of the order requiring the presentation of their claims, and cannot say that they had no such notice, **because, if for no other reason, they are invoking the benefits of the final decree which solemnly adjudicates that they have had due notice for filing their claims and having failed to do so are barred.** They cannot successfully assert a claim under the final decree which finally adjudicates the claim against them.

It is true that respondents on August 29, 1916, the date of the confirmation of the sale, gave notice to the parties to the receivership suit that they claimed, and intended to enforce their claim, that they had liens upon the property sold to the purchaser, prior in right and superior in equity to those of any and all parties whomsoever (R. 587). They, however, made no effort to have the final decree amended to protect their alleged in-

terests, and took no other action to secure any relief from the orders and decrees theretofore entered, but waited until December, 1920, more than four years after the sale was confirmed, before taking any action whatever to protect themselves. In the opinion filed in the District Court on dismissing respondents' interventions, Sanborn, Circuit Judge, in discussing this additional element of laches, held (288 Fed. l. c. 624) that an actual commencement of an action was indispensable, and that the notice of August 29, 1916, was futile to destroy, stay or exclude the estoppel effected by their laches, quoting from Mackall v. Casilear, 137 U. S. l. c. 567, and Penn Mutual Life Insurance Co. v. Austin, 168 U. S. l. c. 697, that "the mere assertion of a claim, unaccompanied with any act to give effect to the asserted right, could not avail to keep alive a right which would otherwise be precluded because of laches."

There were no trust funds from the property of the Railroad Company in the hands of the District Court on December 2, 1920, to pay respondents' claims. The proceeds of the sale had been distributed, the property of the Railroad Company had been sold and conveyed to the purchaser, and the purchaser had paid for it. Its stock and bonds had gone upon the market under two decrees which barred respondents' claims more than four years before they applied for leave to assert them; and respondents presented no reasonable excuse for their delay.

If respondents had filed verified claims pursuant to the interlocutory decree, which they could have done at any time after that decree was entered and before the time for filing claims thereunder had expired, their claims, if established, would have been protected, and they would have shared in the proceeds of the sale of the property of the Railroad Company proportionately with other creditors who exercised diligence to file their claims. They are now barred as the result of their inexcusable laches. Under the circumstances presented, the holding of the Circuit Court of Appeals to the contrary is erroneous.

VII.

The decision of the Circuit Court of Appeals that respondents' claims "arose" after the entry of the final decree, and that respondents were not precluded by the final decree and order of confirmation of sale from asserting said claims, is erroneous.

Respondents are claiming under the final decree and order of confirmation of sale, and are bound thereby. This the Circuit Court of Appeals concedes. By their intervening petitions respondents invoked subdivision (B) of Article Ninth of the final decree (R. 623), which provides that the purchaser, as part of the consideration of the purchase price of the property purchased, should pay

"any unpaid claims of creditors of the Railroad Company which have been or shall be admitted by the parties in interest or adjudged by this court to be prior in lien or superior in equity to the Refunding Mortgage or to the General Lien Mortgage." Article Tenth of the final decree adjudges (R. 626) that notice having been given for the presentation of claims and demands against the Railroad Company of every character and description whatsoever, and the time for the presentation of said claims having expired, no such claim or demand which had not been presented in the cause in accordance with the orders theretofore made requiring presentation thereof, other than * * * * * "(2) any claim or demand which may arise after the entry of this decree", should be enforceable against the receivers, the property sold, or the purchaser, nor should the holder of any claim or demand not so presented be entitled to the benefits of Article Ninth of the decree, nor be entitled to share in the distribution of the proceeds of the sale.

Respondents have consistently contended that their claims arose in November, 1908, and prior thereto, and that the liability of the Railroad Company in respect thereof was established in January, 1914, when the Interstate Commerce Commission made the order of reparation. The Circuit Court of Appeals ruled that respondents' claims "arose" after the entry of the final decree, and hence that respondents are not barred by that decree from asserting their claims. This decree was entered by

Sanborn, Circuit Judge, and his construction of the word "arise" as used in the foregoing quotation from Article Tenth of the decree should control. His views are expressed in his opinion in this case (288 Fed. l. c. 625), as follows:

> "The view of the special master was that the word 'arise' in the exception, 'other than any claim that may arise after the entry of this decree,' did not mean 'accrue,' and that, while the claims of the interveners did not accrue after the entry of the decree, they arose thereafter, and hence were excepted from what seems to the court to be the plain and comprehensive bar of all claims not presented as required by the interlocutory decree contained in that decree and in the final decree. But after thoughtful consideration the court is unable to adopt this view, or to resist the conclusion that the meaning of the word 'arise' in the connection in which it is here used was identical with the meaning of the word 'accrue'—that none of the claims of the interveners either arose or accrued after the entry of the decree, and that they all fall under the ban of both decrees."

In support of the construction placed by the trial court on this provision of the final decree, reference is made to Phillips v. Grand Trunk Ry. Co., 236 U. S. 662, 666, wherein this language appears:

> "When the overcharge was collected a cause of action at once arose and the shipper at once had the right to file a complaint to intervene in proceedings instituted by others."

This proposition is also supported by the decisions of this Court in Southern Pacific Co. v. Darnell-Tanzer Co., 245 U. S. 531, 534, and Louisville Cement Co. v. Interstate Commerce Commission, 246 U. S. 638, 644.

The construction placed by the Circuit Court of Appeals upon the word "arise" as used in the final decree is a strained construction, and one widely at variance with the construction placed thereon by the court which entered that decree and with the intent with which that word was embodied in the decree.

For the reasons above given, it is respectfully submitted that the decree of the Circuit Court of Appeals should be reversed.

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